Hj Hajeedar bin Abdul Majid v Lensa Development Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING-UP NO D7–28–192 OF 2004

T SELVENTHIRANATHAN J

2 AUGUST 2005

Companies and Corporations — Winding up — Just and equitable — Adjournment of hearing of petition — Whether adjournment would be unjust to petitioner

Companies and Corporations — Winding up — Just and equitable — Whether respondents had acted in affairs of company in their own interests rather than in interests of members as a whole — Companies Act 1965 s 218 (f) & (i)

This was an application by the petitioner to wind up the first respondent company, on the grounds stated in s 218(1)(f) and (i) of the Companies Act 1965 ('the Act'). The company was set up and among its objectives was the development of a piece of land in Damansara Heights, Kuala Lumpur. The land was developed and a building was erected on the land, known as Wisma Lensa. This was partially financed by a loan from Malayan Banking Bhd ('the bank'), upon a charge being created in favour of the bank in respect of the land which was the sole property of the company. It was the contention of the petitioner that upon the completion of Wisma Lensa, he was in favour of leasing out some of the units in the building to enable the company to operate as a viable entity but that this was opposed by the second and third respondents, resulting in nothing being done. In the meantime, the debts of the company had been mounting and the petitioner's exposure as a guarantor of the loan to the company by the bank had been increasing. The petitioner also contended that businesses connected with the second and third respondents had been occupying premises in Wisma Lensa without payment of rents to the company.

Held, allowing the application:

(1) The petitioner had proven his contention pursuant to s 218(1)(f) and (i) of the Act that the second and third respondents as directors of the company had acted in the affairs of the company in their own interests rather than in the interests of the members as a whole by reason of their detrimental actions complained of by the petitioner. And that they had also acted in a manner which was unfair and unjust to the other single member of the company, ie the petitioner. It was just and equitable that the company should be wound up. It was clear that the parties had also reached a deadlock situation and no resolution of the deadlock was in sight (see para 6).

(2) The hearing of the petition had been adjourned previously for the express purpose of the parties attempting to reach an amicable solution by resolving the impasse but this never materialised (see para 6). Any further delay in the hearing of the petition, if not agreed to by the petitioner, would only result in the debts of the company mounting further with the consequential increase in the exposure of the petitioner as a guarantor of the loan. This would be unjust to him. Therefore the adjournment was refused (see para 9).

[**Bahasa Malaysia summary**

Ini adalah satu permohonan oleh pempetisyen untuk menggulung syarikat responden pertama, atas asas yang dinyatakan dalam s 218(1)(f) dan (i) Akta Syarikat 1965 ('Akta itu'). Syarikat itu ditubuhkan dan di antara objektif-objektifnya termasuk pemajuan sebidang tanah di Damansara Heights, Kuala Lumpur. Tanah itu dimajukan dan sebuah bangunan telah dibina di atas tanah itu, dikenali sebagai Wisma Lensa. Ini telah dibiayai separuh melalui satu pinjaman daripada Malayan Banking Bhd ('bank itu'), di mana satu caj telah diberi kepada bank itu berhubung degan tanah yang merupakan harta milikan tunggal syarikat itu. Adalah pernyataan pempetisyen bahawa dengan penyiapan Wisma Lensa, beliau menyokong memajak beberapa unit dalam bangunan itu untuk membolehkan syarikat itu beroperasi sebagai satu entiti berdaya maju tetapi bahawa ini dibantah oleh responden-responden kedua dan ketiga, menyebabkan tidak apa-apa dibuat. Pada masa yang sama, hutang-hutang syarikat semakin besar dan pendedahan pempetisyen sebagai penjamin atas pinjaman syarikat kepada bank semakin bertambah. Pempetisyen juga menyatakan bahawa perniagaan berkaitan dengan responden-responden kedua dan ketiga menduduki premis di Wisma Lensa tanpa bayaran sewa kepada syarikat itu.

Diputuskan, membenarkan permohonan itu:

(1) Pempetisyen telah membuktikan pernyataannya menurut s 218(1)(f) dan (i) Akta tersebut bahawa responden-responden kedua dan ketiga sebagai pengarah syarikat telah bertindak secara menjejaskan dalam hal-hal syarikat mengikut kebaikan sendiri dan bukan untuk kebaikan ahli-ahli keseluruhannya seperti yang diadu oleh pempetisyen. Dan bahawa mereka telah bertindak dengan tidak adil dan saksama terhadap ahli-ahli perseorangan syarikat, iaitu pempetisyen. Adalah adil dan berekuiti bahawa syarikat itu digulung. Adalah jelas bahawa pihak-pihak telah sampai keadaan kebuntuan dan tiada penyelesaian kepada kebuntuan itu (lihat perenggan 6).

(2) Pembicaraan petisyen telah ditunda sebelum ini bagi tujuan ternyata pihak-pihak sedang mencuba mencapai satu penyelesaian dengan menyelesaikan masalah itu tetapi ini tidak terjadi (lihat perenggan 6). Sebarang kelewatan lagi dalam pembicaraan petisyen ini, sekiranya tidak disetujui oleh

pempetisyen, akan menyebabkan hutang-hutang syarikat bertambah besar dan menambahkan pendedahan pempetisyen sebagai penjamin kepada pinjaman itu. Ini adalah tidak adil kepadanya. Oleh itu, penundaan ditolak (lihat perenggan 9).]

Notes

For cases on winding up on just and equitable grounds, see 3(1) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 887–915.

Legislation referred to

Companies Act 1965 s 218(1)(f) and (i)

Mahinder Singh Dulku (S Palanivel and Siti Aishah bte Aziz with him) (Palani, Aishah & Co) for the petitioner.

Mohd Fuad Husini (Leslie Bala, Jamal Ridzuan bin Musa and Baharin bin Rejab with him) (Syarikat KL Rekhraj) for the respondents.

Huzaimi bin Hashim (Dzuraida bte Zakaria and Yusnita bte Wagino with him) for the Official Assignee.

T Selventhiranathan J:

[1] This was an application by the petitioner *vide* encl 1 to wind up the first respondent, Lensa Development Sdn Bhd ('the company'), on the grounds stated in s 218(1)(f) and (i) of the Companies Act 1965.

[2] The company was set up and among its objectives was the development of a piece of land in Damansara Heights, Kuala Lumpur. The land was developed and a building was erected on the land, known as Wisma Lensa. This was partially financed by a loan from Malayan Banking Berhad ('the bank') to the tune of RM7,000,000 upon a charge being created in favour of the bank in respect of the land which was the sole property of the company.

[3] The petitioner and the third respondent are brother and sister, while the second respondent is the brother-in-law of the petitioner, being married to the third respondent. The petitioner holds 50% of the shares of the company while the second and third respondents jointly hold the remaining 50% of the shares.

[4] It was the contention of the petitioner that upon the completion of Wisma Lensa, he was in favour of leasing out some of the units in the building to enable the company to operate as a viable entity but that this was opposed by the second and third respondents, resulting in nothing being done. In the meantime, the debts of the company had been mounting and the petitioner's exposure as a guarantor of the loan to the company by the bank had been increasing. The petitioner also contended that businesses connected with the

second and third respondents had been occupying premises in Wisma Lensa without payment of rents to the company. The second and third respondents, on the other hand, contended that such occupation was with the consent and acquiescence of the petitioner, which was denied by the petitioner.

[5] From as far back as the 28 August 2002, the petitioner made attempts to have the impasse between him and the second and third respondents resolved through the purchase of his shares in the company by the second and third respondents but to no avail. According to the petitioner, the second and third respondents were making unreasonable offers for the purchase of his shares and had not been serious in their purported intention. He therefore presented this petition to wind up the company on the grounds appearing in the said s 218(1)(f) and (i).

[6] Having perused the cause papers, the affidavits and the voluminous documents filed in relation to this petition, I was satisfied that the petitioner had proved his contention pursuant to the said s 218(1)(f) and (i) that the second and third respondents as directors of the company had acted in the affairs of the company in their own interests rather than in the interests of the members as a whole by reason of their detrimental actions complained of above by the petitioner, and that they had consequentially also acted in a manner which was unfair and unjust to the other single member of the company, ie the petitioner. I was therefore of the opinion that it was just and equitable that the company should be wound up and ordered accordingly. In my view, it was clear beyond pre-adventure that the parties had also reached a deadlock situation and no resolution of the deadlock was in sight. The hearing of the petition had been adjourned previously for the express purpose of the parties attempting to reach an amicable solution by resolving the impasse but this never materialised.

[7] By the time the petition came to be heard finally on the 23 June 2005, the bank had already issued a notice to the petitioner calling upon his guarantee of the loan extended to the company. The bank also supported the petition. The petition was further supported *vide* encl 14 by a creditor of the company called JPS Consulting Engineers Sdn Bhd, which was a contractor of the company, for the sum of RM58,125, being the sum owing in respect of civil and structural engineering services extended to the company.

[8] A last-ditch attempt was made by the learned counsel for the respondents to obtain a further adjournment of the hearing of the petition on the basis that his clients had met with the bank to restructure the loan. This attempt was resisted by the learned counsel for the petitioner on the ground that such intimation was only made that morning and, furthermore, that his client objected to any further postponement of the hearing of the petition because when the matter had come up for hearing on the 11 March 2005, the parties had agreed to an adjournment of that hearing for the purpose of enabling the second and third respondents to purchase the petitioner's shares. However,

when the petition had come up for mention subsequently on the 24 March 2005, the court had been informed that the matter could not be settled and the parties had requested that the petition be fixed for hearing, which had been done accordingly.

[9] Having regard to all the prevailing circumstances, I was of the view that, any further delay in the hearing of the petition, if not agreed to by the petitioner, would only result in the debts of the company mounting further with the consequential increase in the exposure of the petitioner as a guarantor of the loan. This would be unjust to him. I therefore refused the adjournment and made an order in terms of encl 1 and appointed a liquidator for the company, as prayed for, at the same time.

Appeal allowed.

Reported by Peter Ling